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NO. 80-2030

in the Supreme Court of the United States

OCTOBER TERM, 1980

REDERLAKTIEBOLAGET GUSTAF ERIKSON AND CONSOLIDATED BATHURST LIMITED,
Petitioners,

vs.

OBBIE MALLARD AND DAISY MALLARD, HIS WIFE,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
PREFACE TO "QUESTION PRESENTED"	1
STATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES CITED

Cases	Page
Evans v. S. S. Campeche, 639 F.2d 848, (CA2, 1981)	5
Scindia v. de los Santos, 101 U.S. 614 (1981) No. 79-512	1, 3
Slaughter v. Ronde, 380 F.Supp 637 (S.D.Ga. 1974) Aff'd 509 F.2d 973, (CA5 1975)	5

OTHER AUTHORITY

Restatement (Second) of Torts (1965) Sec. 343	4

PREFACE TO "QUESTION PRESENTED"

Respondents cannot accept the "Question Presented" as set forth by Petitioners for the reason that it fails to properly address the findings of the Fifth Circuit. There was never any question raised as to a "continuous" inspection of the cargo during loading and no question raised as to "continuous" inspection of the dunnage used. The Fifth Circuit made no findings as to any "continuous" inspection being required.

The "Question Presented" improperly seeks a general review of the merits of this case, which the Fifth Circuit remanded for a trial on the facts and merits.

Further, there is no conflict in the findings of the Fifth Circuit with this Court's findings in *Scindia v. de los Santos*, 101 U.S. 614, (1981), Case 79-512.

RESPONDENTS' STATEMENT OF THE CASE

Basically, Respondents agree with the Petitioners' statement of the case except as hereafter set forth.

There is no question that the foreign loading stevedore was negligent in creating and leaving a large void space between the rolls of newsprint at the time of loading. There is a question as to whether the ship's officers, through reasonable, customary inspection should have discovered and corrected the condition which the discharging stevedore could not detect or discover through reasonable inspection. The dangerous condition developed at a foreign loading port while the loading was under the supervision of the ship's officers. It is submitted

that a reasonable, customary inspection at that time should have discovered and corrected the conditions which the discharging stevedore could not detect. At issue is what type of reasonable inspection must ship's officers conduct at a foreign loading port to protect a discharging stevedore who is totally unaware of dangerous conditions which existed and which caused serious injuries.

Regarding the question of the condition of the walking boards, it is submitted that the ship's crew had a duty to inspect them by reasonable, customary inspections and replace any dangerous or defective boards. Petitioner admits that an examination by the crew on the return voyage to Canada constituted the extent of the vessel owners' inspection of the walking boards.

Petitioner claims that prior knowledge of the shipowner of past dangerous stowage is immaterial. We disagree. We submit this knowledge places a higher degree of care on the vessel. We further note that Petitioner makes no mention in its statement of facts of the ". . . unusually large void . . ." between rolls of newsprint which was

> ". . . at least one and a half feet by two feet in area, as opposed to the average gap of approximately six inches. It was hidden from view by the plywood boards. . ."

as set forth in the Fifth Circuit's Opinion.

RESPONDENTS' ARGUMENT OPPOSING PETITION FOR A WRIT OF CERTIORARI

1. There is no conflict in the *Scindia* holding and the Fifth Circuit decision in *Mallard*. Further, there is no conflict between the Circuits on the holdings in these cases.

Scindia dealt with the question of malfunctioning ship's gear and the respective duties of the shipowner vis a vis the discharging stevedore. The shipowner could be liable if it had actual knowledge of winch problems or if it knew the winch was defective from the outset. At issue in *Scindia* was the question of the respective duties once the cargo operation begins and the shipowner learns, or should know, of a dangerous condition which exists.

Should the shipowner have intervened if it knew the winch problem created a clearly unsafe condition? This question was left for determination by a jury since there was a material question of fact raised as to whether the shipowner had actual knowledge of a defect or should have known of the defect from the outset of operations.

Mallard deals with a loading stevedore in a foreign port creating large holes or gaps between stowed rolls of newsprint and then covering them with plywood supplied by the vessel and its time charterer. There is a question of fact as to the unsafe condition of the plywood since it gave way when a forklift passed over it when discharging cargo in a U.S. port.

Can a foreign, loading stevedore be assumed to have the knowledge and expertise of a U.S. stevedore? It is submitted that the intent of Congress was not to deprive an injured longshoreman of a negligence claim against a vessel which was improperly loaded in a foreign port due to improper or inadequate supervision of the ship's officers.

Petitioner is saying that the ship's officers need not inspect while cargo is being loaded in a foreign port because they can totally rely on the loading stevedore to do it safely and they then cannot be charged with any form of negligence.

We submit they overlook Sec. 343 of the Restatement (Second) of Torts (1965) where the shipowner would be liable if he:

> (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Here the condition was not open and obvious. It was in effect, a trap created by the shipowner which directly caused injury to an innocent discharging

longshoreman. Here the injured person and his employer were clearly not in a position to discover the danger.

As the Fifth Circuit pointed out in its opinion:

> "... Where the hazard is latent and nonobvious, the stevedore's control over loading and discharge is less relative because he is in no better position to know of the risks than the vessel owner. In such situations, knowledge of the vessel owner, rather than control of the stevedore, should be the focus of inquiry. ."

The Fifth Circuit appropriately pointed out that Congress through passage of the 1972 Amendments, did not intend to derogate from the maritime law imposing liability on a vessel owner whose officers

> ". . . see or have actual visual notice of or ample time to observe, unsafe stevedoring operations . . ."

and do not take corrective action. *Slaughter v. Ronde*, 380 F.Supp. 637 (S.D. Ga., 1974), aff'd 509 F.2d 973 (CA5 1975).

Further, there may be circumstances where it would not be reasonable for the shipowner to assume that the stevedore will correct a problem. If the shipowner should anticipate the stevedore will not, or cannot, correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard. See *Evans v. S.S. Campeche*, 639 F.2d 848, (CA2, 1981).

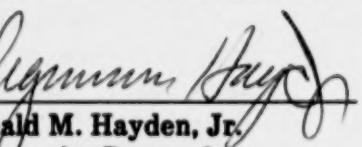
Such is the situation here. A vessel owner cannot be rewarded for its officers' inattentiveness. If the inattentiveness is unreasonable, then he should bear the consequences.

CONCLUSION

Based on the foregoing, the Petition for Certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF
REGINALD M. HAYDEN, JR., P.A.

By: 
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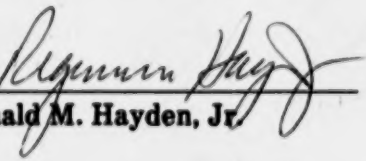
I CERTIFY that three copies of this Brief were mailed to JAMES L. HURLEY, ESQUIRE, FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., Attorneys for Petitioner, 25 West Flagler Street, Miami, Florida 33130, this 1 day of Sept, 1981.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